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NO. .....

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

LEE MARSHALL HARRIS and
MORRIS RAY CALDWELL,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioners, Lee Marshall Harris and Morris Ray Caldwell, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 27, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the appendix hereto (Appendix "A"). No opinion was rendered by the District Court for the Central District of California. (Appendix "A" is as originally issued. This was later corrected to reflect appeal from the "Central District of California.")

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 27, 1970. A timely petition for rehearing *in banc* was denied on August 28, 1970 (Appendix "B"), and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).[1]

QUESTIONS PRESENTED

1. Whether the Court should consider, on a petition for certiorari, the judgment of the Court of Appeals reversing a pre-trial district court order suppressing evidence as unconstitutionally seized.

2. Whether federal customs agents may, consistent with the Fourth Amendment and federal statutes and regulations, search any vehicle at any time and at any distance from the border, simply because the vehicle has been kept under

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1 Whether or not the Court should hear this case at this time is recognized as a substantial question in itself. For that reason, petitioners include, as a reason why the writ should be granted, a discussion of the jurisdictional question.

"constant surveillance" from the time it crossed the border.

3. Should the Court review a decision of a Court of Appeals which has reversed an order of a district court compelling the suppression of evidence, when this is the only evidence which the government seeks to use?

STATEMENT OF THE CASE

This case involves the legality of so-called "extended border searches." A truck crossed the Mexican-American border at San Ysidro, California, and drove to Los Angeles. Customs officials who had followed the truck from San Ysidro arrested petitioners as they left the location at which it was parked in Los Angeles. The officials then returned to the truck, searched it, and discovered contraband.

Judge Manual Real, of the Central District of California, held that the search of the truck was illegal and ordered that the contraband taken from the truck (the government's only evidence) be suppressed. The United States sought review. On July 27, 1970, in a one-sentence per curiam opinion, the Court of Appeals for the Ninth Circuit reversed. Petitioners filed a timely petition for rehearing and for rehearing *in banc*. The petition for rehearing, together with a motion for stay of the mandate, was denied by the court on August 28, 1970.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of Other Courts of Appeals.

A. The decisions of the Ninth Circuit:

The "extended border search" decisions arising out of the Ninth Circuit have undergone considerable change in recent years. Earlier cases recognized that border searches were of a "specialized category, readily distinguishable" from other searches (*United States v. Yee Ngee How*, 105 F.Supp. 517 [N.D.Cal. 1952]), and that because of the need for "national self-protection" (*Carroll v. United States*, 267 U.S. 132, 154 [1927]), they could be of "the broadest possible character" (*Yee Ngee How*, *supra*, 105 F.Supp. at 520). All persons crossing the border were subject to search without warrant, without arrest, and without probable cause.

The debate and change has centered around the location of the border. It has long been clear that routine investigation conducted as the individual came across the border was permissible. Questions first arose, as in *Yee Ngee How*, *supra*, when the search was not the routine and expected search, but a delayed and secondary search. Still, these searches were upheld because they did take place on the border. Searches a great distance from the border were not permitted. In *Cervantes v. United States*, 263 F.2d 800 (1959), the Ninth Circuit held that a search of an auto more than seventy miles from the border, where there was "no indication . . . that [the defendant] had wrongfully eluded federal officials at the border," could not be justified, because there was no "showing of probable cause" (263 F.2d at 803 n. 5). *Plazola v. United States*, 291 F.2d 56 (9th Cir. 1961), involved substantially similar facts. Of importance is only the fact that the car "had been followed by customs agents to the point

where it was stopped" (291 F.2d at 58), "fifty or sixty miles north of the Mexican border" (291 F.2d at 57). There was no discussion of the "constant surveillance"; the officers were required to produce probable cause (291 F.2d at 61).

In subsequent cases the "elastic" border has been stretched and the necessary justifications for the search have shrunk. In *King v. United States*, 348 F.2d 814 (9th Cir. 1965), a search eight miles from the border was held to be just like a search on the border. "Constant surveillance" was noted by the court as important, but there was still retained the requirement that there be "no unreasonable time" and "no unreasonable distance" between the border and the place where the search was made (348 F.2d at 816). *Cervantes v. United States, supra*, was distinguished, both because there had been no "pursuit" of Cervantes and because the cause to arrest him was less. *Plazola, supra*, was ignored.

Alexander v. United States, 362 F.2d 379 (9th Cir. 1966), represents the next step in the stretching of the "elastic" border. It is not clear how far the car was from the border when it was searched. Significant, however, is the increased importance given to "surveillance" (362 F.2d at 380). No longer need the search be within a reasonable time and distance of the border. These factors were held to be important only insofar as they might "convince the fact finder with reasonable certainty that any contraband which might be found in the or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States" (362 F.2d at 382).

The stage was then set for the holdings in *Gonzalez-*

Alonso v. United States, 379 F.2d 347 (9th Cir. 1967) (search eleven miles from the border permissible); *Rodriguez-Gonzales v. United States*, 378 F.2d 256 (9th Cir. 1967) (search twenty miles from the border permissible); *Castillo-Garcia v. United States*, 424 F.2d 482 (9th Cir. 1970) (search one hundred five miles from the border permissible), and the holding of the present case, allowing a search one hundred fifty miles from the border.

Thus, the Ninth Circuit now holds that "the distance from the border, whether it be 105 miles or 500 miles," is of itself unimportant. "Probable cause" is not necessary. There is no standard of cause which must be satisfied. *Castillo-Garcia v. United States, supra*, 424 F.2d at 484.

B. The decisions of the Fifth Circuit:

The "extended border search" cases of the Fifth Circuit fall into a relatively consistent pattern. The standard employed by that court is distinctly different from the one now used by the Ninth Circuit. The focus is not upon "surveillance" but upon "necessity" and "reasonable cause."

The earliest decision appears to be *Ramirez v. United States*, 263 F.2d 385 (1959). The search there apparently took place a considerable distance from the border (263 F.2d at 386 n. 1). The importance of the case is that the search was conducted at a routine check point, one which was—"of necessity"—set up a distance from the border. Moreover, the conduct of the defendants gave the customs officials probable cause to search (263 F.2d at 387 n. 2).

Marsh v. United States, 344 F.2d 317 (1965), is substantially similar. The court required that there be some showing by the arresting customs officers "which reasonably justified" the extended border search. There was no discussion of "surveillance"; the focus remained on the *cause* for the search.

Valadez v. United States, 358 F.2d 721 (5th Cir. 1966); *Willis v. United States*, 370 F.2d 604 (5th Cir. 1966); *Morales v. United States*, 378 F.2d 187, 190 (1967), and *Stassi v. United States*, 410 F.2d 946, 951 (1961), all require at least "reasonable cause to suspect" before a search can take place. (This is the language of 19 U.S.C. Section 482, the statute which gives authority to search to customs officials.) No case has focused on surveillance alone. See especially *Stassi v. United States, supra.* No case has entirely exempted customs officials from showing reasonable cause. All cases differ substantially from those decided in the Ninth Circuit.

C. The decisions of other circuit courts:

Apparently, most of the problems involving "extended border searches" arise in the Fifth and the Ninth Circuits, for there are few in the remaining courts. Those few cases, however, agree in their rejection of the standard employed by the Ninth Circuit. In *United States v. McGlone*, 384 F.2d 75 (4th Cir. 1968), the court took into consideration "the distance of the search from the point where the goods crossed the border, the time that has elapsed since the suspect had an opportunity to bring in the goods, and the circumstance upon which the officers

base their suspicions" (384 F.2d at 78 [footnotes omitted]). Judge Waterman, in *United States v. Glaziou*, 402 F.2d 8 (2d Cir. 1968), offers one of the best criticisms of the Ninth Circuit view with this comment:

> "[O]f course the authority of customs officers to search an individual after a person has left the border area is more limited than the right of customs officers to search at the actual border. If this were not the case, an individual would always be subject to search without probable cause no matter where he was in the United States, and no matter how long he had been inside the United States if the search were conducted by the Bureau of Customs. Such a condition would be repugnant to the principles of the Fourth Amendment." (402 F.2d at 8, 13, 14 no. 3.)

The difference in result when the standard of the Second Circuit is employed is made clear by *United States v. Pedersen*, 300 F.Supp. 669 (D.Vermont 1969).

2. This Case Involves An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This Court has never directly ruled on the standard to be used in determining the legality of border searches. The dictum of Chief Justice Taft in *Carroll v. United States*, 267 U.S. 132, 154 (1927), represents the only attempt by the Court to set any standard for border searches:

> "Travelers may be so stopped in crossing

> an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

This statement has been completely disregarded by the Courts of Appeals and was disregarded by the court below in this case. The search of the truck in Los Angeles was approximately 150 miles from the border over which it crossed. This, according to the Court of Appeals, makes no difference. "The distance from the border, whether it be 105 miles or 500 miles," is of itself unimportant. *Castillo-Garcia v. United States*, 424 F.2d 482, 485 (9th Cir. 1970), and cases there cited. The Ninth Circuit has also consistently held that probable cause to search is unnecessary. *Castillo-Garcia, supra*, 424 F.2d at 482.

The only showing that the Ninth Circuit requires is that there be "reasonable certainty that any contraband which might be found in the vehicle at the time of the search 'was aboard the vehicle at the time of entry into the jurisdiction of the United States.'" *Castillo-Garcia, supra*, 424 F.2d at 485. This requirement is satisfied, according to the Ninth Circuit, whenever there is "constant surveillance" of the vehicle from the border to the place of search. Petitioners in the present case stipulated

that there was such surveillance.

Petitioners have argued and will contend that the focus on "surveillance" ignores fundamental Fourth Amendment rights and gives enforcement officials much greater power than they need to efficiently enforce the customs laws of the United States. The relevant statutes and regulations need not and should not be interpreted to sanction efforts of customs officials which so deeply and unnecessarily intrude upon the reasonable expectations of security of those persons—of both this country and foreign countries—who return or visit the United States. See *Katz v. United States*, 389 U.S. 347 (1968); *Kent v. Dulles*, 357 U.S. 116 (1958).

The Ninth Circuit has itself concluded that the Fourth Amendment applies to "border searches" (*Henderson v. United States*, 390 F.2d 805, 807 [9th Cir. 1967]) but refuses to recognize the fundamental constitutional corollary that the nature of the material sought cannot justify a search. See *Warden v. Hayden*, 387 U.S. 294 (1966) (concurring opinion of Douglas, J.). Moreover, the court below ignores the equally fundamental principle that there can be no search without a warrant and without probable cause unless there is some compelling reason to do away with those requirements. See *Chimel v. United States*, 395 U.S. 752 (1969); *Terry v. Ohio*, 392 U.S. 1 (1969); *Sibron v. New York*, 392 U.S. 40 (1969). Where the search does not take place at the border, but miles and hours away, there is no necessity for a search without probable cause and without a warrant.

There is also no statutory authority which confers the broad powers which the Ninth Circuit has given customs agents. United States Code, Title 19, Section 482, as well

as the relevant federal regulations, 19 C.F.R. Section 23.1, 19 C.F.R. Section [illegible], all require "reasonable cause to believe" that there are grounds for search.

3. Review Should Be Available At This Time, Even Though The Judgment Below Is Not Final In Form.

Although the decision of the Ninth Circuit Court of Appeals is not in form a final judgment, it can and should be reviewed at this time. There is an important and clear-cut issue of law that is fundamental to the further conduct of the case and which would otherwise, petitioners submit, qualify as a basis for certiorari. Such a case may be reviewed despite its interlocutory status. See *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Land v. Dollar*, 330 U.S. 731, 734 n. 2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 n. 3 (1949); R. Stern & E. Gressman, Supreme Court Practice, Sec. 4.19 (4th ed. 1969). In the last two named cases the Court reviewed decisions, such as that of the Court of Appeals in this case, reversing a ruling of a district court which ended the litigation and remanding the case for trial.

While the Court has held that a pre-trial order suppressing evidence is not final (*Carroll v. United States*, 354 U.S. 394 [1956]), it *has* considered criminal cases where the decision sought to be reviewed was not a final judgment, even in cases coming from outside the federal courts. *Mills v. Alabama*, 384 U.S. 214 (1965); *California v. Stewart*, 384 U.S. 436, 498 n. 71 (1966).

Moreover, the *Carroll* decision involved an attempt by

the *government* to seek review of a district court order suppressing evidence sought to be used against a defendant. The decision was based to a large extent on the principle that "appeals by the *government* in criminal cases are something unusual, exception and not favored" (354 U.S. at 400 [emphasis added]), "at least in part because they always threaten to offend the policy behind the double jeopardy provision . . . " (*Will v. United States*, 389 U.S. 90, 96 [1967]).

These considerations behind the refusal to allow the government to seek review in the circumstances of *Carroll* thus clearly do not apply where it is the defendant who is seeking review of the successful effort of the government to reverse a suppression order. Indeed, one other consideration militating against review by the government clearly supports a defendant's desire to secure the decision of the Court. As the Court said in *Will, supra*, "[the] general policy against piecemeal appeals takes on added weight in criminal cases, where the *defendant* is entitled to a speedy resolution of the charges against him" (389 U.S. at 96). See *DiBella v. United States*, 369 U.S. 121, 126 (1962). It seems quite clear that to delay review by the Court until after trial will not aid in the speedy resolution of the charges against petitioners.

Finally, the increasing recognition given the necessity of allowing such issues to be resolved finally prior to trial should be noted. See, *e.g.*, Cal.Pen.Code Sec. 1538.5(i); *Mann v. Superior Court*, ... Cal.3d ..... (1970); A.L.I. discussion of interlocutory appeals of suppression orders, 38 L.W. 2630.

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should be granted.

Respectfully submitted,

MARKS, SHERMAN & LONDON

BY BURTON MARKS, ESQ.

Attorneys for Petitioner
Morris Ray Caldwell

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
LEE MARSHALL HARRIS and
MORRIS RAY CALDWELL,
Defendants-Appellees.

No. 25,120

[July 27, 1970]

Appeal from the United States District Court
for the Eastern District of California

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and *THOMPSON, District Judge.

PER CURIAM:

The narcotics were seized in circumstances essentially similar to those in *Castillo-Garcia v. United States*, 424 F.2d 482 (9th Cir. 1970); accordingly, the order of the district court suppressing the use of such drugs as evidence is

Reversed.

*Honorable Bruce R. Thompson, United States District Judge, Reno, Nevada, sitting by designation.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Caption—Case No. 25,120]

[August 28, 1970]

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and THOMPSON, District Judge.

The panel, as constituted in the above case, has voted to deny defendants-appellees' petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. (Fed.R.App.P. 35(b)).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Additionally, defendants-appellees' motion for a stay of the mandate is denied.

APPENDIX "C"

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco, California 94101

[August 23, 1970]

Burton Marks, Esq.
9720 Wilshire Blvd.
Beverly Hills, Calif. 90212

Dear Sir:

The Petition for a Rehearing heretofore filed in Case No. 25120 - USA v. LEE MARSHALL HARRIS & MORRIS RAY CALDWELL was this day denied.

Pursuant to Rule 41(a) and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of seven (7) days from the date hereof.

Sincerely,

Wm. B. Luck,

Clerk.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on SEPTEMBER 27th, 1970, I served the within PETITION FOR WRIT OF CERTIORARI (Harris-Caldwell v. United States) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR
U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 (3 copies)

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. (1 copy)

U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT
SEVENTH & MISSION STREETS
SAN FRANCISCO, CALIFORNIA (1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 27th, 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer